ESG FACTORS HERE TO STAY IN FRAUD AND INSOLVENCY

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Onshore or offshore, whatever your industry, ESG factors are here to stay - that was the emerging theme of a series of workshops we ran on sustainability issues within fraud and insolvency at September's FIRE Summit for fraud and insolvency practitioners.

That's not to say that the future, or even the exact nature, of ESG and sustainability in business are mapped out. In the series of sessions that we held the practitioners agreed that the nebulous scope of the topic made it hard to define the nature of the issues, particularly given the varied possibilities for focus on the 'E' (Environmental), the 'S' (Social) or the 'G' (Governance).

As an emerging field that arguably captures the current zeitgeist, ESG provides ample opportunity for innovation, but its evolving nature also presents business challenges and threats, such as the risk of fraud or investment in the 'wrong' technology.

There is clear evidence that sustainability, particularly in relation to climate change, is becoming increasingly mainstream. Indeed, one of the many announcements coming out of this UN summit on climate change, COP26, encapsulate the challenges presaged within our discussions, including proposed UK Treasury rules to compel businesses to show how they intend to hit climate change targets. Currently, the intention is that there will be no mandatory commitments, but the plans will need to be public. While campaigners have already said that transparency is not enough and there should be hard law obligations in this area, the UK Treasury believes that market forces will encourage credible planning.

Although the finance industry is considered according to some reports to be a significant contributor to the world's carbon emissions, it equally offers significant opportunities to influence global issues beyond local governmental regulation, in support of the UK Treasury's thesis [1]. From the early philanthropic investments in social good, to the 21st century recognition that consideration of ESG issues may fall within the fiduciary duties of investment and pension professionals, there has been significant growth in investment with ESG drivers. From green finance to shareholder activism, there has been a significant increase in ESG investor demand, leading to an SEC Risk Alert in April 2021 that warned investors may be misled in terms of performance and the underlying nature of investments ultimately obtained.

1 Although the authors note that the recently announced National Savings and Investment Green Bonds offer a lower gross annual equivalent rate than the National Savings and Investment "non-Green Bonds".

The relevance to fraud and insolvency of ESG issues does not depend on any particular philosophy on the climate, or social and governance issues – they are 'value neutral' in that sense. That said, it's Ogier's view that what's good for the environment and society is also good for business in the long term, and for that reason Ogier is the first offshore law firm to gain membership of the Net Zero Lawyers Alliance, to make a public commitment to the Science Based Target Initiative (SBTi) and to voluntarily disclose its gender pay gap, among other innovations..

Prior to the FIRE conference and at the start of each of our four FIRE sessions we took polls to gauge the level of interest and knowledge attendees had in ESG and sustainability issues. We thought that interest levels would be high (why would you attend that kind of session if you weren't interested?) but it was not clear what the knowledge base would be. In fact, there was a wide range of responses – from attendees who expressed little experience of the subject to those who considered it to be part of their everyday practice. The wide range of interests expressed during the feedback captured the broad ranging scope of the topic and the interconnectedness of issues – something that can be missed in newspaper headlines and soundbites.

During the course of our sessions, the practitioners recognised that the significant flight of capital to ESG values or products, either in pursuit of personal philosophies, perceived greater returns [2] or in compliance with regulatory pressure, presents potential significant opportunities, challenges and threats for practitioners in this area.

The groups also varied widely by sector, from insolvency practitioners to lawyers and supply-chain investigators. Those

different professionals brought different perspectives and interests, and topics discussed included:

- the potential future regulatory landscape (foreshadowing the changes coming out of COP26)
- opportunities and risks associated with the development of ESG-linked technologies (is investment in pioneering green technology visionary or foolhardy?)
- the potential halo effect of ESG investment and the risk that its effects may lead investors to overlook otherwise prudent governance mechanisms
- 'greenwashing' issues – when is a commitment not a commitment, and who is the arbiter of this?
- increasing shareholder activism rather than divestment
- verification and investigation of carbon trading and offsetting and the dangers of fraud in ESG enterprises – carbon credit fraud is already part of the story of ESG
- class action risks and opportunities – for example, can practitioners help businesses to avoid class actions by facilitating a genuine understanding of what is going on in their supply chains?
- the question of whether there are obligations on directors and fiduciaries to factor in ESG obligations, and whether these obligations might conflict with other duties
- the risk to insolvency office-holders of increased regulatory risk, stranded assets and asset valuation integrating ESG factors
- supply chain risk, reporting and investigations – who is best placed to do this, and are there opportunities for practitioners from different fields to work together?
- client need for genuine ESG compliance to satisfy their obligations
- employee talent perception of genuine commitment to whole range of ESG values – many attendees noted that in recent years potential recruits have been regularly asking about their businesses' commitment to ESG

We did four hour-long sessions, but we could have discussed the topics for much longer. It is clear to us that voluntary and compulsory development in these areas will continue and whatever the philosophies of practitioners in this space, ESG factors are here to stay.

2 The authors take no view on whether greater returns from ESG products are produced by qualitative factors of the underlying products, indicators of quality in the pursuit of these factors or market perception of such correlative factors, but again note the disparity between the NS&I Green Bond and non-Green bond rates.